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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No. 2

MISSOURI PACIFIC RAILROAD COMPANY,
a Corporation,
Appellant,

vs.

RUFUS E. DEERING, As Register of Deeds of Sedgwick County, Kansas, and MARIE WARDEN, As County Treasurer of Sedgwick County, Kansas,
Appellees.

ON APPEAL FROM THE JUDGMENT OF THE SUPREME COURT OF THE STATE OF KANSAS.

JURISDICTIONAL STATEMENT.

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Appellees.

ON APPEAL FROM THE JUDGMENT OF THE SUPREME COURT OF THE STATE OF KANSAS.

JURISDICTIONAL STATEMENT.

Pursuant to Supreme Court Rule 13, paragraph 2, and Rule 15, appellant files this, its jurisdictional statement, as follows:

OPINIONS OF COURTS BELOW.

The opinion and judgment of the Supreme Court of the State of Kansas reversing the judgment of the District Court of Sedgwick County, Kansas, was delivered on March 7, 1959, and is reported in *Missouri Pacific Railroad Co. v. Deering*, 184 Kan. 283, 336 P.2d 482, and is appended hereto as Appendix "A." The opinion of the District Court of Sedgwick County, Kansas, dated February 6, 1958, which is unreported, is appended hereto as Appendix "B." The judgment of the District Court of Sedgwick County, Kansas, dated February 6, 1958, is appended hereto as Appendix "C."

GROUNDS ON WHICH JURISDICTION IN INVOKED.

This proceeding was originally brought by appellant against appellees in the District Court of Sedgwick County, Kansas, as a civil action to recover taxes in the amount of $262,969.96 exacted by and paid under protest to the Register of Deeds of Sedgwick County, Kansas, by appellant as a so-called mortgage registration fee (which the Supreme Court of Kansas has held to be a tax) under the provisions of Sections 79-3102 to 79-3107 of the General Statutes of Kansas, 1949 (G. S. 1949, 79-3102 to 79-3107), upon two mortgages filed and recorded by the reorganized Missouri Pacific Railroad Company in that county and 59 other counties in Kansas in compliance with an order of the federal court in which the railroad was reorganized requiring such mortgages to be filed and recorded by all recording officers "upon payment of their proper recording and filing fees," "the laws of any state to the contrary notwithstanding." (R. 12, 62-63). This action is author-

ized and was brought under the provisions of Section 79-2005 of the General Statutes of Kansas, 1949 (G. S. 1949, 79-2005), which provides for actions for the recovery of taxes paid under protest. The state district court rendered judgment on February 6, 1958, in favor of appellant for the sum of $262,969.96 and costs (R. 73-4) as prayed for in its petition. Appellees appealed to the Supreme Court of the State of Kansas (R. 75-7), which reversed the judgment of the district court on March 7, 1959, and ordered judgment for the appellees (R. 80-91). A motion for a rehearing (R. 93-106) was filed by appellant, which was denied on April 15, 1959, without opinion (R. 109) and the judgment became final. The notice of appeal herein was filed in the Supreme Court of the State of Kansas on June 2, 1959. (R. 110-12.)

The statutory provision believed to confer on the Supreme Court of the United States jurisdiction of this appeal is Section 1257 of Title 28 of the United States Code (62 Stat. 929), which provides that final judgments or decrees rendered by the highest court of a state in which a decision could be had may be reviewed by the Supreme Court of the United States by appeal (1) "where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity" and (2) "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

The cases believed to sustain the jurisdiction of the Supreme Court to review the judgment are as follows:

Factors', etc., Ins. Co. v. *Murphy*, 111 U. S. 738, 741.

New Orleans, etc., R. R. Company v. *Delamore*, 114 U. S. 501.

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The statute of the United States the validity of which is involved is Section 205(f) of Title 11 of the United States

Code (53 Stat. 1406), which is appended hereto as Appendix "D."

There is further involved Section 10.04 of the Consummation Order and Final Decree (R. 18-72) issued and entered by the United States District Court for the Eastern District of Missouri, Eastern Division, pursuant to and under the authority of Section 205(f) of Title 11 of the United States Code (53 Stat. 1406), above referred to, in the reorganization proceedings of Missouri Pacific Railroad Company, which is appended hereto as Appendix "E."

The statute of Kansas the validity of which is involved is Sections 79-3102 to 79-3107 of the General Statutes of Kansas, 1949, and particularly Sections 79-3102, 79-3103 and 79-3107 thereof, which is appended hereto as Appendix "F."

It is important to observe at the outset that the Kansas mortgage registration statute here under attack has been more than once definitely held by the Supreme Court of Kansas to be not a fee but a tax, and that that state statute requires the payment of the mortgage registration tax by the mortgagee (not the railroad mortgagor) as a condition precedent both to the recording of mortgages and also to their enforceability.

QUESTIONS PRESENTED BY APPEAL.

The questions presented by this appeal are as follows:

1. Whether the United States District Court for the Eastern District of Missouri, Eastern Division, in the railroad reorganization proceedings entitled "In the Matter of Missouri Pacific Railroad Company, Debtor," had authority under the provisions of 11 U. S. C. Section 205(f), to re-

quire by Section 10.04 of its Consummation Order and Final Decree that appellant's two mortgages be filed and recorded by the Register of Deeds of Sedgwick County, Kansas, upon payment by the mortgagor railroad of the Kansas statutory filing and recording fees only.

2. Whether the provisions of 11 U. S. C., 205(f) (53 Stat. 1406), and Section 10.04 of the Consummation Order and Final Decree issued pursuant thereto, are valid and supreme and take precedence over the provisions of Sections 79-3102 to 79-3107 of the General Statutes of Kansas, 1949, which provide for the payment by mortgagees of a mortgage registration tax before mortgages may be filed and recorded.

3. Whether Sections 79-3102 to 79-3107 of the General Statutes of Kansas, 1949, and particularly their application to the filing and recording of appellant's two mortgages, violate Section 1 of the Fourteenth Amendment to the Constitution of the United States for the reason that such statutes and their application to appellant's two mortgages deprive appellant of its property without due process of law, and violate the provisions of 11 U. S. C., Section 205(f) (53 Stat. 1406).

STATEMENT OF THE CASE.

From 1933 to 1956 the Missouri Pacific Railroad Company was in reorganization proceedings in the United States District Court for the Eastern District of Missouri, Eastern Division, under the provisions of Section 77 of the Amended Bankruptcy Act (11 U. S. C. 205, 53 Stat. 1406), and all of its railroad and other properties were owned and operated by a trustee or trustees appointed by that court, and such trustees and the property of the railroad were under the jurisdiction of that court. (R. 9.)

On March 1, 1956, the reorganization proceedings were terminated and brought to a conclusion by a Consummation Order and Final Decree signed and issued by the bankruptcy court, and a plan of reorganization approved by the Interstate Commerce Commission and confirmed by the court was put into effect and the railroad became reorganized under that plan, and the reorganized railroad was thereby authorized, directed and empowered to do everything that became necessary or proper to carry out such plan and the Consummation Order and Final Decree, the laws of any state or the decision or order of any state authority to the contrary notwithstanding, in accordance with the provisions of Section 205(f) of the Amended Bankruptcy Act (11 U. S. C. 205[f]). (R. 9.)

Pursuant to and as part of the plan of reorganization, and as provided by the Consummation Order and Final Decree, all of the mortgages outstanding against the debtor railroad were declared null and void and discharged and satisfied, and were ordered released (R. 47-48) and the reorganized railroad was authorized and required to execute two mortgages, a First Mortgage in favor of Boatmen's National Bank of St. Louis, as Trustee, and a General (Income) Mortgage in favor of Manufacturers Trust Company and Charles Herman as Trustee, both mortgages covering the property of the railroad, including its property in Kansas. (R. 9-10.)

The Consummation Order and Final Decree also provided that such two mortgages should be filed and recorded, the specific provision with reference thereto being as follows:

> "10.04. *Recording and Filing Documents.* Upon payment of their proper recording and filing fees, all recording officers of recording districts (including Parishes and Cities, States and Counties) in which the

properties of the Reorganized Company shall be located after the Consummation Date shall record or file for record this Order as well as all documents the execution of which is directed in this Order, or in the documents herein approved, as may be tendered to them for filing or recording, and to make such marginal or other notations in their records as may be necessary or appropriate to evidence and to record the true intent and purpose of all such documents tendered to them for filing or for recording, the laws of any state to the contrary notwithstanding." (R. 12, 62-3.)

In compliance with the above-quoted provision and requirement of the Consummation Order and Final Decree, the reorganized railroad, on March 12, 1956, delivered and tendered the two mortgages to the Register of Deeds of Sedgwick County, Kansas, for filing and recording and paid the filing and recording fees thereon, but the Register of Deeds refused to record them until the mortgage registration tax provided by the Kansas statute (G. S. 1949, 79-3102 to 79-3107) in the sum of $262,969.96 was paid. (R. 12.) The reorganized railroad then paid the mortgage registration tax to the Register of Deeds under written protest (R. 5-6; 12-13) in order to obtain filing and recording of the mortgages in the office of the Register of Deeds of Sedgwick County, Kansas, and in the offices of the Registers of Deeds in the other 59 counties in Kansas where the railroad's property is located, in compliance with the Consummation Order and Final Decree.

On April 11, 1956, appellant, the reorganized railroad, brought this action by filing its petition in the District Court of Sedgwick County, Kansas, to recover the taxes so paid under protest. (R. 1-6.)

The federal questions sought to be reviewed in this court were first raised in the district court by pleading them in the petition filed by appellant as follows:

"6. Plaintiff further states that the exaction and imposition of said mortgage registration tax of $262,-963.96 and the payment of which was so made under duress and protest was and is invalid in each and all of the following particulars and for each and all of the following reasons, to-wit:

* * *

"(b) Said statute (G. S. 1949, 79-3102 to 79-3107) is unconstitutional and in violation of the Fourteenth Amendment to the Constitution of the United States for the reason that it takes property without due process of law;

"(c) Said statute is a burden on interstate commerce and an undue interference with the field occupied by the Interstate Commerce Act and by Section 77 of the Bankruptcy Act, and the enforcement of said statute has the effect of preventing plaintiff from carrying out the provisions of said Consummation Order for the recording of said mortgages unless a tremendously burdensome registration fee is paid for the privilege of having said mortgages recorded;

"(d) The jurisdiction conferred by acts of Congress upon the Interstate Commerce Commission and upon said Federal Reorganization Court to authorize liens and the issuance of securities upon the property of such interstate common carriers by railroad as the plaintiff is exclusive and plenary, and said state statute requiring the payment of said mortgage registration tax, as a condition precedent (1) to recording the mortgages or (2) to their reception in evidence or (3) to any judgment, decree or order for the enforcement thereof is an encroachment upon and in derogation of said Federal jurisdiction, and in violation of said Federal statutes, and also in contravention of the Fourteenth Amendment to the Constitution of the United States in that it would deprive the security holders of due process

of law and of the equal protection of the law." (R. 3-5.)

After an answer was filed by appellees admitting some of appellant's allegations and putting others in issue (R. 7-8), the case was submitted to the district court upon the pleadings and an agreed statement of facts (R. 8-17), and the district court, in effect, passed upon the federal questions pleaded by finding that the appellant was not subject to the payment of the mortgage registration tax and that it was entitled to have its two mortgages filed and recorded without payment of the tax, and by rendering judgment in favor of appellant for $262,969.96, the amount of the mortgage registration tax paid under protest by appellant. (R. 73-74.)

The federal questions were again raised in the Supreme Court of the State of Kansas upon appellees' appeal and by appellant's motion for rehearing, and the court passed upon them in its opinion and decision reversing the judgment of the district court by specifically holding adversely to appellant's allegations and contentions upon the federal questions (R. 86-90) and by denying appellant's motion for rehearing, in which they were again raised. (R. 93-106, 109.)

GROUNDS FOR CONTENTION THAT FEDERAL QUESTIONS INVOLVED ARE SUBSTANTIAL.

The grounds upon which it is contended the federal questions involved herein are substantial are:

This action involves the sum of $262,969.96 in taxes exacted unlawfully from the appellant railroad company, emerging from bankruptcy by reorganization in proceedings under the Amended Federal Bankruptcy Act, by state

recording officials under the Kansas mortgage registration law as a condition precedent to the recording of appellant's two mortgages, notwithstanding an order of the federal reorganization court requiring that, upon payment of proper recording and filing fees, such mortgages be recorded as a part of the reorganization proceedings and the reorganization plan approved by the court and by the Interstate Commerce Commission, "the laws of any state to the contrary notwithstanding," (R. 10, 62-3) which order was issued under the authority of and in compliance with Section 205(f) of Title 11 of the United States Code (53 Stat. 1406).

It has been contended at all times in this case that the refusal of the appellee register of deeds to file and record the two mortgages of appellant, the mortgagor (the filing and recording fees being tendered), unless the tax provided by G. S. 1949, 79-3102 to 79-3107 to be paid by the mortgagee was paid, was in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and the provisions of 11 U.S.C., Section 205(f) and the order of the United States District Court based thereon, and that the enforcement of the Kansas statute with respect to appellant's two mortgages would constitute a burden on interstate commerce. In this connection, the validity of the state statute as applied under the circumstances of this case was involved and the Kansas Supreme Court decided in favor of its validity.

Since the question of violation of the Fourteenth Amendment is involved, this court has jurisdiction to consider the case on appeal. (*Provident Savings Ass'n* v. *Kentucky*, 239 U. S. 103, 112; *Bluefield Co.* v. *Pub. Serv. Comm.*, 262 U. S. 679, 683; *Nor. Pacific* v. *Dept. Public Works*, 268 U. S. 39; *Ward & Gour* v. *Krinsky*, 259 U. S. 520;

Miller v. *Schoene*, 276 U. S. 272; *Fiske* v. *Kansas*, 274 U. S. 380; *Treagea* v. *Modesta Irrigation District*, 164 U. S. 179; *Cudahy Co.* v. *Parramore*, 263 U. S. 418, 422.)

This court also has jurisdiction on appeal where the question involved is whether or not the application of a state statute would constitute a burden on interstate commerce. (*Terminal Assn.* v. *Trainmen*, 318 U. S. 1; *Atchison R. Co.* v. *Pub. Util. Comm'n*, 346 U. S. 346.)

The Kansas Supreme Court in its opinion herein refused to take cognizance of and apply the rule of supremacy of acts of Congress as the law of the land as provided in the United States Constitution (Article VI) and applied many times by this court where there is a conflict between federal and state laws, by holding that the provisions of 11 U. S. C., Sec. 205(f) and the Consummation Order and Final Decree (Section 10.04) thereon based were ineffective to require the filing and recording of the two mortgages, "the laws of any state or the decisions or orders of any state authority to the contrary notwithstanding." The Kansas statute, as applied by the appellee Register of Deeds to appellant and the two mortgages involved by requiring that the mortgage registration tax must be paid as a condition precedent to the filing and recording of the mortgages, constituted a law and an order of a state authority (that of the Register of Deeds) which came within the prohibition of 11 U. S. C., Sec. 205(f)—"the laws of any State or the decision or order of any State authority to the contrary notwithstanding"—and the similar prohibition in Section 10.04 of the Consummation Order and Final Decree. The question of the validity and supremacy of the Federal Bankruptcy Law and the order of the Federal Bankruptcy Court was thus clearly a question at issue in this case, and the Kansas Supreme Court in effect held against its validity and supremacy as applied to the facts and circumstances

of this case and in effect held in favor of the validity of the state statute with respect to such facts and circumstances. It is clear this situation presents a federal question and this court has jurisdiction. It has been so held in the following cases: *Stoll* v. *Gottlieb*, 305 U. S. 165; *Case* v. *Bowles*, 327 U. S. 92, 102; *R. F. C.* v. *Beaver County*, 328 U. S. 204, 206-7; *Morris* v. *Jones*, 329 U. S. 545, 553; *Seaboard R. Co.* v. *Daniel*, 333 U. S. 118.

It is also apparent that a right, privilege or immunity under a statute of and authority exercised under the United States is claimed and was specially set up in this case and thus a federal question was and is presented and this court has jurisdiction for that reason. (*Factors', etc., Ins. Co.* v. *Murphy*, 111 U. S. 738, 741; *New Orleans, etc., R. R. Company* v. *Delamore*, 114 U. S. 501; *Traer* v. *Clews*, 115 U. S. 528, 533-4; *Roby* v. *Colehour*, 146 U. S. 153, 159-60; *Texas & Pacific Railway* v. *Johnson*, 151 U. S. 81, 98-9; *Missouri, Kansas & Texas Railway* v. *Haber*, 169 U. S. 613; *Pittsburgh, etc., Railway* v. *Loan & Trust Co.*, 172 U. S. 493, 507, 510; *Talbot* v. *Sioux City First Nat'l Bank*, 185 U. S. 172; *Haire* v. *Rice*, 204 U. S. 291, 298-9; *Hammond* v. *Whittredge*, 204 U. S. 538; *West Side R. R. Co.* v. *Pittsburgh Cons. Co.*, 219 U. S. 92, 99; *Kansas City So. Ry.* v. *Albers Comm. Co.*, 223 U. S. 573, 590-1; *Atchison, etc., Ry. Co.* v. *Robinson*, 223 U. S. 173, 180; *Sage* v. *Hampe*, 235 U. S. 99; *Donohue* v. *Vosper*, 243 U. S. 59.)

By reason of the foregoing appellant firmly believes that the federal questions involved herein are substantial and that a decision upon them is essential to a disposition of the issues in this case, and that this court has

jurisdiction to review the judgment and decision appealed from.

Respectfully submitted,

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